IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES C. NEWELL, JR. **APPELLANT**

V. **NO. 2013-KA-00030-COA**

STATE OF MISSISSIPPI **APPELLEE**

PETITION FOR WRIT OF CERTIORARI

OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
Hunter N. Aikens, Miss. Bar No. 102195
P.O. Box 3510
Jackson, Mississippi 39207-3510
Telephone: 601-576-4290
Fax: 601-576-4205
email: haike@ospd.ms.gov

Counsel for James C. Newell, Jr.

TABLE OF CONTENTS

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES C. NEWELL, JR. **APPELLANT**

V. **NO. 2013-KA-00030-COA**

STATE OF MISSISSIPPI **APPELLEE**

PETITION FOR WRIT OF CERTIORARI

COMES NOW THE APPELLANT, James C. Newell, Jr., through counsel, and petitions this Court, pursuant to Rules 17(a)(3)(i) and (ii) of the Mississippi Rules of Appellate Procedure, to grant certiorari review of the Mississippi Court of Appeals's decision handed down in this matter on September 23, 2014, and in support thereof would show unto this Honorable Court the following:

This appeal involves James C. Newell's conviction of manslaughter following the second jury trial in this matter. On September 23, 2014, the Mississippi Court of Appeals reversed and remanded this case for a new trial in an opinion that addressed one of the six issues raised; the Court of Appeals' opinion and judgment are attached to this petition as Appendix A. The Court of Appeals denied Newell's motion for rehearing on February 10, 2015; copies of Newell's motion for rehearing and the Court of Appeals' notice denying the same are attached as Appendix B and Appendix C.

Certiorari review is warranted in this case "for the purpose of resolving substantial questions of law of general significance"[1] in the five issues raised by Newell that the Court of Appeals' opinion declined to address. The unresolved questions in this case "involve fundamental issues of broad

[1] M.R.A.P. 17(a).

public importance" and statutes "which should have been decided by this Court." Accordingly, Newell requests this Court to grant certiorari review pursuant to Rules 17(a)(3)(i) and (ii) of the Mississippi Rules of Appellate Procedure.

ARGUMENT

The Court of Appeals addressed one issue[2] in remanding this case for a new trial: the trial court's error in allowing Dr. Stephen Hayne to give speculative testimony that the deceased, Adrian Boyette, was in a "guarded position" when he was shot. Opinion at (¶¶7-13). Newell maintains that the Court of Appeals' Majority correctly decided that issue, as Dr. Hayne's "guarded position" testimony was clearly reversible error. *See, e.g.*, *Parvin v. State*, 113 So. 3d 1243 (Miss. 2013); *Edmonds v. State*, 955 So. 2d 787 (Miss. 2007).

The five issues unresolved by the Court of Appeals' opinion are addressed below. Newell submits that the proper remedy in this appeal is to finally terminate the proceedings against him by either (1) reversing and rendering his conviction and sentence due to the insufficiency of the evidence or (2) dismissing the indictment with prejudice and ordering his immediate release due to the violation of his right to speedy retrial. Should this Court decline to reverse and render or to dismiss the indictment, Newell requests that the remaining issues be addressed in this direct appeal because they are "likely to arise once again on remand." *Brooks v. State*, 763 So. 2d 859, 864 (¶15) (Miss. 2000).

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

The evidence failed to prove beyond a reasonable doubt that Newell did not act in necessary

---

[2] The Court of Appeals acknowledged all six issues that Newell raises in this appeal. Opinion at (¶6).

self defense as defined by the "Castle Doctrine" and its attendant presumption of reasonable fear pursuant to Mississippi Code Annotated Sections 97-3-15(1)(e) and 97-3-15(3). As such, Newell requests this Court to reverse and render his conviction and sentence.

Mississippi Code Annotated Section 97-3-15(1) provides in relevant part that a killing "shall be justifiable[:]"

> (e) When committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or upon or in any dwelling, in any occupied vehicle, in any place of business, in any place of employment or in the immediate premises thereof in which such person shall be.

Miss. Code. Ann. § 97-3-15(1)(e).

The "Castle Doctrine" is addressed in Sections 97-3-15(4) and 97-3-15(3). In "*Newell I*," this Court explained that these Sections set forth "two prongs" of the Castle Doctrine defense:

> First, under subsection (4), if the defendant is in a place where he had a right to be, is not the immediate provoker and aggressor, and is not engaged in unlawful activity, he has no duty to retreat before using defensive force. Miss. Code Ann. § 97-3-15(4) (Rev.2006). And second, if the jury finds that any of the circumstances in subsection (3) are satisfied, the defendant who uses such defensive force is presumed to have reasonably feared imminent death or great bodily harm or the commission of a felony upon him. Miss. Code Ann. § 97-3-15(3) (Rev.2006).

Newell v. State, 49 So. 3d 66, 74 (¶22) (Miss. 2010). Recently, in *Matthews v. City of Madison*, six members of this Court determined that in order to invoke the Castle Doctrine, "[a] defendant must initially show that he was using defensive force. . . ." *Matthews v. City of Madison*, 143 So. 3d 571, 577 (¶17) (Miss. 2014) (King, J., specially concurring).

The evidence in this clearly satisfied Newell's initial burden to show that he was using "defensive force" and both prongs of the Castle Doctrine defense such that no reasonable juror could find beyond a reasonable doubt that he did not justifiably kill Adrian Boyette in necessary self defense.

Initial burden to show "defensive force"

The evidence firmly established Newell's initial burden to show that he using defensive force. Jason Hollis–Boyette's friend of twenty years and the only eyewitness–testified that he saw Boyette follow Newell to Newell's truck and slam the door on his leg; Hollis admittedly quit watching before he heard the shot, but he added that he did hear "a heated argument " and that Boyette "wasn't backing down." (Tr. 219-21, 227-30). Newell's testimony filled-in the gap. He testified that, after Boyette pursued him to his truck and slammed the door on his legs, Boyette continually beat on Newell's truck while threatening "I'm fixing to F you up" as he (Boyette) "start[ed] pulling the door handle open." (Tr. 503-04, 530-31). Newell explained that as Boyette attempted to pull the door open, he (Newell) pushed on the door in an attempt to back Boyette away; Boyette threatened "I'm fixing to cut you up" while grabbing for the knife in his pocket; and Newell grabbed his pistol and shot Boyette one time. (Tr. 503-04, 530-31).

First prong; Section 97-3-15(4)

As to the first prong, Newell unquestionably had a right to be in his own truck or "in the immediate premises thereof,"[3] and the evidence provided no indication that Newell was engaged in unlawful activity. The evidence also firmly established that Boyette–by following Newell to his truck, slamming the door on his legs, continually beating on the truck while threatening "I'm fixing to F you up. I'm fixing to F your world up," and attempting to pull Newell's truck door open–was the immediate provoker and aggressor. (Tr. 220-21, 228-29, 502-04, 528-31).

Second prong; Section 97-3-15(3)

Most importantly, the evidence firmly established the Castle Doctrine's second prong–that

---

[3] *Newell*, at 77 (¶30) (citing Miss. Code Ann. § 97-3-15(3)).

is, that Newell was statutorily presumed to have reasonably feared death, great bodily harm, or the commission of a felony upon him because the circumstances surrounding his use of defensive force fell squarely within those clearly articulated by Section 97-3-15(3).

As applicable to the this case, Section 97-3-15(3)'s statutory presumption of reasonable fear applies if:

> (1a) "the person against whom the defensive force was used, was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered, . . . [an] occupied vehicle . . . or the immediate premises thereof" or
>
> (1b) "that person had unlawfully removed or was attempting to unlawfully remove another against the other person's will from that . . . occupied vehicle . . . or the immediate premises thereof" and
>
> (2) "the person who used defensive force knew or had reason to believe that the forcible entry or unlawful and forcible act was occurring or had occurred."

Mississippi Code Annotated §97-3-15(3).

In *Matthews*, this Court recently noted that "the holding [*in Newell I*] implies that, although Newell should have been entitled to a presumption if the jury believed him, this presumption could have been rebutted, as the trier of fact must still weigh the reasonableness of the action in light of the presumption." *Matthews*, 143 So. 3d at 575 (¶10). Significantly, the *Matthews* Court clarified that "[t]he application of the presumption *does not depend on the existence of reasonable fear* in the defendant; *rather, the presumption applies if one of the circumstances in subsection (3) is met.*" *Id.*, at 574 (¶8) (citing *Newell*, 49 So. 3d 66) (emphasis added).

The evidence in this case was such that no reasonable juror could find beyond a reasonable doubt that the circumstances in subsection (3) were not met and that the presumption of reasonable fear did not apply. The evidence detailed above in addressing Newell's initial burden to show defensive force clearly established that Newell shot Boyette while Boyete "was in the process of

unlawfully and forcibly entering" Newell's occupied vehicle and/or "was attempting to unlawfully remove [Newell] against [his] will from that . . . occupied vehicle . . . or the immediate premises thereof." Miss. Code Ann. § 97-3-15(3). The evidence also left no doubt that Newell "knew or had reason to believe that [Boyette's] forcible entry or unlawful and forcible act was occurring or had occurred." *Id.* No reasonable juror could have found beyond a reasonable doubt that the circumstances in subsection (3) did not apply. Consequently, Newell was statutorily presumed "[t]o have reasonably feared death, great bodily harm, or the commission of a felony upon him[,]" and his killing of Boyette was legally justified.

By adopting the Castle Doctrine and its statutory presumption of reasonable fear, our Legislature chose to provide exceptional protection against conviction for a killing to persons who use defensive force in certain clearly prescribed circumstances. The evidence in this case fell squarely within those circumstances. "'[T]he ultimate goal of this Court in interpreting a statute is to discern and give effect to the legislative intent.'" *Tipton v. State*, 150 So. 3d 82, 87 (¶17) (Miss. 2014) (quoting *City of Natchez, Miss. v. Sullivan*, 612 So. 2d 1087, 1089 (Miss. 1992)). "If the statute is not ambiguous, the court should interpret and apply the statute according to its plain meaning. . ." *Id.*, at 682 (¶10) (citations omitted). Newell respectfully requests this Court to simply apply the Castle Doctrine and to reverse his conviction for sentence for manslaughter and render a judgement of acquittal in his favor.

II. THE TRIAL COURT ERRED IN DENYING NEWELL'S MOTION TO DISMISS FOR VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY (RE)TRIAL.

Newell's right to a speedy trial is guaranteed by both our federal and state constitutions. U.S. Const. amend. VI; Miss. Const. art. 3, § 26. Where a case is reversed on appeal, the timeliness of the retrial is "measured . . . under the constitutional right to a speedy trial as enunciated in *Barker*

v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972)." *Stevens v. State*, 808 So. 2d 908, 915 (¶16) (Miss. 2002) (citation omitted). Thus, the inquiry turns to the following familiar factors: "(i) length of the delay, (ii) reason for the delay, (iii) defendant's assertion of his right, and (iv) prejudice to the defendant." *Flora v. State*, 925 So. 2d 797, 815 (¶60) (Miss. 2006).

Length of the delay

The speedy retrial clock began on December 23, 2010, the date on which this Court entered its mandate reversing Newell's first conviction. *Stevens*, 808 So. 2d at 916 (¶18) (citing *Duplantis v. State*, 708 So. 2d 1327, 1334 (Miss. 1998)). Newell's second trial began approximately 600 days later on August 21, 2012. This delay exceeds eight (8) months, therefore, it is presumptively prejudicial and triggers a balancing of the remaining three *Barker* factors. *State v. Woodall*, 801 So. 2d 679, 681-82 (¶¶11-13) (Miss. 2001). This factor weighs in Newell's favor.

Reason for the delay

Trial was initially set for February 22, 2011; on March 3, 2011, a continuance was entered resetting trial for May 16, 2011, for the reason that Newell was still awaiting a copy of the transcripts from the first trial. (See, C.P. 189-90, Supp. C.P. 1). This 82-day delay should, at worst, be weighed equally against the State and Newell, as Newell could not obtain the transcripts until the trial court provided them.

On March 27, 2011, an order continuing trial until August 16, 2011,was entered because the prosecutor had another trial scheduled. (C.P. 190; Supp. C.P. 2). This 92-day delay was for "a more neutral reason;" nevertheless, it is weighed against the State because "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192.

On November 1, 2011, Newell filed a motion for recusal; two days later an order was entered

transferring the case to a different judge. (C.P. 21, 24). The circuit clerk's docket indicates that a notice of trial setting was entered the same day, but the record does not indicate the date trial was set. Then, on February 27, 2012, an order was entered continuing trial until May 29, 2012, for the stated reason that "the court was unable to resolve and the Defendant filed new dispositive motions that were not heard this term." (Supp. C.P. 3). Newell acknowledges some delay is attributable to him filing motions.[4] However, the nine-month delay between the August 2011 trial setting and May 29, 2012 setting (as per the court's February 2012 order), cannot sensibly be weighed against Newell due to motions. Instead, the bulk of this largely unexplained delay should be weighed against the State. Where the delay is presumptively prejudicial, "the burden shifts to the prosecution to produce evidence justifying the delay and to persuade the trier of fact of the legitimacy of these reasons." *State v. Ferguson*, 576 So. 2d 1252, 1254 (Miss. 1991).

On May 29, 2012, the parties met for trial with a jury venire awaiting, and the State announced for the first time that it wished to use the transcripts of two of its witnesses, Jason Hollis and Shelia Ray, in lieu of their presence at trial. (Tr. 47-49; C.P. 4). The parties trial strategies had shifted since Newell's first trial for murder (at which manslaughter was effectively a defense) and his second trial, at which the State's theory was that Newell was guilty of manslaughter. Therefore, Newell objected to the State's motion to use the witnesses' prior testimony, and he was effectively forced to assent to a continuance to leave open the possibility that he would able to cross-examine Hollis at his second trial. Three days later–on June 1, 2012–an order was entered setting trial for August 21, 2012 for the stated reason that, "It appearing to the Court that an Indictment has been filed against the defendant . . . the above styled and numbered cause should be set for trial . . . ."

---

[4] "Motions made and granted on behalf of the defense are charged against them." *Poole v. State*, 826 So. 2d 1222, 1228 (Miss. 2002) (citation omitted).

(C.P. 80). The court's stated reason for this continuance is perplexing, as no new indictment was ever filed–despite Newell's demand that a new indictment be filed. (See C.P. 30). Trial finally commenced on August 21, 2012. (Tr. 104). The 82-day delay between the May 29, 2012 setting and trial on August 21, 2012, was not caused by Newell and should count against the State.

In sum the bulk of the delay between this Court's December 23, 2010 mandate, and Newell's second trial on August 21, 2012, should be weighed against the State. This factor also weighs in Newell's favor.

Assertion of the right

When it became apparent that Newell would not be tried during the August, 2011 term of court, trial counsel filed a demand for speedy trial on September 2, 2011–approximately 159 days after the mandate in *Newell I* was entered. (C.P. 9). Thus, Newell asserted his right to a speedy trial before the eight-month threshold. Two motions to dismiss were also filed. (C.P. 60-62, Supp. C.P. 4). And the trial court entered an order denying them. (C.P. 78-79). "[W]here the defendant asserts his right to a speedy trial, 'he gains far more points' under this prong of Barker." *Johnson v. State*, 68 So. 3d 1239, 1242-43 (¶10) (Miss. 2011) (quoting *Thomas v. State*, 48 So. 3d 460, 476 (Miss. 2010)). This factor weighs in Newell's favor.

Prejudice to the defendant

"[P]rejudice is assessed in the speedy trial context (1) to protect against oppressive pretrial incarceration, (2) for the minimization of anxiety and concern of the accused, and (3) for the limitation of the possibility of impairment of the defense." *Johnson v. State*, 885 So. 2d 72, 80 (¶30) (Miss. Ct. App. 2004) (quoting *Elder v. State*, 750 So. 2d 540, 545 (¶19) (Miss. Ct. App. 1999)).

In this case, Newell actual defense was prejudiced because the delay resulted in the loss of the only eyewitness–Hollis–and Newell was forced to defend against the State's theory of

manslaughter without the ability to cross-examine Hollis with an eye toward negating manslaughter as a possible verdict. "If witnesses die or disappear during a delay, the prejudice is obvious." *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193. Newell submits that record in this case shows that he was prejudiced by the delay. Thus, this factor weighs in Newell's favor.

Conclusion

All four Barker factor weigh in Newell's favor. Accordingly, Newell's right to a speedy retrial was violated, Newell requests this Court to dismiss the indictment against him with prejudice and to order his immediate release.

III. THE TRIAL COURT ERRED IN GRANTING SEVERAL JURY INSTRUCTIONS.

Newell's second trial was prejudiced by the erroneous grant of several instructions that the prosecutor requested in an overzealous attempt to define-away Newell's defense. The result was a set of instruction which, read as a whole, set forth contradictory and improper statements of the law that ultimately served only to confuse and mislead the jury on the principles of law applicable to the straightforward facts of the case.

Instruction S-5A

The trial court erred in granting instruction S-5A, as it was not supported by the evidence. Instruction S-5A read as follows:

> The Court instructs the Jury that if you find from the evidence in this case beyond a resonable doubt that:
>
> (1) On May 14, 2008, the victim, Adrian Boyette, was the initial aggressor, but that he withdrew from the aggression and retreated;
>
> (2) and that thereafter on May 14, 2008, the Defendant, JAMES C. NEWELL, JR., in Lowndes County, Mississippi;
>
> (3) did become the aggressor and unnecessarily kill Adrian Boyette;
>
> (4) not in necessary self defense;

> Then you shall find the Defendant guilty of Manslaughter. If the prosecution has failed to prove any of the above listed elements beyond a reasonable doubt, then you shall find JAMES C. NEWELL, JR., not guilty of Manslaughter.

(C.P. 161, Tr. 601, R.E. 12).

The only act of aggression on Newell's part that the evidence established was his pulling the trigger one time in response to Boyette's escalating, threatening action. As argued above, Newell's act was legally justified. In requesting this instruction, the prosecutor grossly exaggerated Hollis's testimony by representing to the trial court that Hollis testified that "Boyette was walking away" when Newell shot him. (Tr. 601). Hollis did testify that after the initial heated exchange between Boyette and Newell, "they both started walking away from me," and "they walked to [Newell's] truck." (Tr. 219-20). But Hollis clearly testified that he quit watching before the shot was fired and did not see the shot. (Tr. 227, 229-30). To this end, the Court of Appeals' opinion notes that "[H]ollis stated that he did not see Boyette prior to the shooting; he only looked after he heard the gunshot." Opinion at (¶12).

"[A]n instruction not supported by the evidence should not be given.'" *Conerly v. State*, 879 So. 2d 1101, 1108-09 (¶28)(Miss. Ct. App. 2004) (quoting *Haggerty v. Foster*, 838 So. 2d 948, 954 (¶14) (Miss. 2002)). Instruction S-5A was not supported by the evidence, and the trial court erred in granting it.

Instruction S-4

Through instruction S-4, the prosecutor attempted (successfully) to create and present to the jury a form of manslaughter not cognizable under Mississippi law that undercut Newell's castle doctrine defense. Instruction S-4 stated:

> The Court instructs the Jury that if you find from the evidence in this case beyond a

reasonable doubt that:

1. James C. Newell, Jr., on or about May 14, 2008, in Lowndes County, Mississippi;

2. did unnecessarily kill Adrian Boyette;

3. and not in self-defense;

4. while Adrian Boyette was engage [sic] in the perpetration of any crime or misdemeanor not amounting to a felony, or while Adrian Boyette was in the attempt to commit any crime or misdemeanor;

Then you shall find the Defendant guilty of manslaughter . . . .

(C.P. 156, R.E. 11).

Although instruction S-4 resembles the crime of misdemeanor manslaughter under Mississippi Code Annotated Section 97-3-29,[5] it presented the jury with an inverse application of Section 97-3-29 by instructing that Newell was guilty of manslaughter if he killed Boyette while *Boyette*–not Newell–was committing a misdemeanor. This instruction attempted to undercut Newell's defense by equating Boyette's actions from conduct that helped establish Newell's defense with conduct supporting Newell's guilt for a nonexistent form of manslaughter.

"[T]he trial court does not have the power to fashion a new crime." *Shaffer v. State*, 740 So. 2d 273, 283 (Miss. 1998) (citing *Windham v. State*, 602 So. 2d 798, 807 (Miss. 1992) (Robertson, J., concurring). Instruction S-4 incorrectly stated the law and presented for the jury's consideration a crime not cognizable under Mississippi law. Instruction S-4, therefore, lacked a

---

[5] Mississippi Code Annotated Section 97-3-29 provides:

> The killing of a human being without malice, by the act, procurement, or culpable negligence of another, *while such other* [i.e., the killer] is engaged in the perpetration of any crime or misdemeanor not amounting to felony, or in the attempt to commit any crime or misdemeanor, where such killing would be murder at common law, shall be manslaughter.

Miss. Code. Ann. § 97-3-29 (emphasis added)

legal basis, and the trial court erred in granting it.

Instruction S-1

The error in granting instructions S-4 and S-5A created further error in the trial court's grant of a general form of the verdict instruction (S-1), which directed:

> The Court instructs the Jury that if you find the Defendant guilty as charged, the form of your verdict should be as follows:
>
> "We, the Jury find the Defendant guilty as charged."
>
> The Court instructs the Jury that if you find the Defendant not guilty, the form of your verdict should be as follows:
>
> "We, the Jury find the Defendant not guilty."
>
> You should write your verdict on a separate piece of paper.

(C.P. 153, R.E. 9). As requested, the jury returned a general verdict stating only, "We, the Jury find the defendant guilty as charged." (C.P. 179, R.E. 14). This verdict was insufficient and must be set aside, as it fails to convey which of the several grounds the jury's verdict rested.

"The basic test with reference to whether or not a verdict is sufficient as to form is whether or not it is an intelligent answer to the issues submitted to the jury and expressed so that the intent of the jury can be understood by the court." *Coles v. State*, 756 So.2d 12, 14(¶ 12) (Miss. Ct. App. 1999). "In criminal cases if different counts are charged in the indictment or if the court instructs the jury as to related or lesser offenses, the jurors shall, if they convict the defendant, make it appear by their verdict on which counts or of which offenses they find the defendant guilty." U.R.C.C.C. 3.10.

Where as here, "a jury has been instructed that it may rely on any one of two or more independent grounds, and one of those grounds is insufficient, a subsequent general verdict of guilty must be set aside *because the verdict may have rested exclusively on the insufficient ground.*" *Phillips v. State*, 493 So. 2d 350, 355 (Miss. 1986) (emphasis in original) (citing *Stromberg v.*

California, 283 U.S. 359, 369-70, 51 S.Ct. 532, 535-36 (1931) (additional citations omitted). In addition to heat-of-passion manslaughter, the jury at Newell's trial was instructed on two independent insufficient grounds (instructions S-4 and S-5A) that incorrectly permitted the jury to convict. Because the jury's general verdict may have rested on an insufficient ground, the trial court erred in granting instruction S-1; the verdict against Newell must be set aside; and this case must be remanded for a new trial.

IV. THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF NEWELL'S TELEPHONE MESSAGES FROM HIS WIFE'S PHONE.

The trial court erred in admitting evidence of Newell's threatening messages left on his wife's cell phone hours before the incident. These messages were inadmissible under Mississippi Rules of Evidence 401 and 402 because they were irrelevant as to whether he shot Boyette in self defense or in the heat of passion upon sudden provocation. The messages were also inadmissible prior bad acts evidence under Rules of 404(b) and 403 because the risk of unfair prejudice in their admission substantially outweighed the probative value, if any.

The messages were irrelevant and inadmissible under M.R.E 401 and 402

"'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.E. 401. "Evidence which is not relevant is not admissible." M.R.E. 402. While the messages at issue were sufficiently relevant to the State's theory of deliberate design murder at Newell's first trial,[6] they were not relevant at Newell's second trial, at which deliberate design was not at issue and the case turned on whether Newell acted in self-defense or in the heat of passion upon sudden provocation.

---

[6] In *Newell I*, this Court determined that the messages were relevant to the State's theory of deliberate-design murder; however, the Court expressly made "no findings on their relevance or probative value in further proceedings." *Newell*, 49 So. 3d at 72 (¶13).

The messages were inadmissable under M.R.E. 403 and 404(b)

Mississippi Rule of Evidence 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." M.R.E. 404(b). Mississippi Rule of Evidence 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R.E. 403).

"[E]vidence in criminal trials must be 'strictly relevant to the particular offense charged.'" *United States v. Jackson*, 339 F.3d 349, 354 (5th Cir. 2003) (quoting *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083 (1949)). Evidence of difficulties between the defendant and third parties is generally inadmissible. *See generally, e.g., Russell v. State*, 607 So. 2d 1107, 1116 (Miss. 1992) (citing *Carter v. State*, 167 Miss. 331, 145 So. 739 (1933)). The evidence of Newell's prior messages threatening Dianne and Tony (and then quickly recanting the threat), permitted the impermissible inference that Rule 404(b) seeks to prohibit. It prejudiced Newell's defense by inviting the jury to attribute Newell's disposition or ill will toward Dianne and Tony to a third person–Boyette–that Newell shot for different reasons or motivations that subsequently arose. Newell submits that the risk of unfair prejudice in the admission of this evidence substantially outweighed its probative value.

Accordingly, this evidence was inadmissible under Rules 404(b) and 403. The trial court erred in admitting it. And Newell is entitled to a new trial, at which the jury should not receive this prejudicial evidence.

V. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO READ HOLLIS' PRIOR TESTIMONY IN LIEU OF HIS PRESENCE.

The trial erred in granting the State's motion to use the transcript of Hollis' testimony from Newell's first trial for deliberate design murder in lieu of his presence at Newell's second trial for manslaughter. Hollis' prior testimony was inadmissible at Newell's second trial under Mississippi Rule of Evidence 804(b)(1) because Newell had a dissimilar motive to develop Hollis' testimony at the second trial.

Rule 804(b)(1) provides that an unavailable witnesses' former testimony is not excluded as hearsay "[i]f the party against whom the testimony is now offered, . . . *had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.*" M.R.E. 804(b)(1) (emphasis added). Newell's motives to develop Hollis' testimony was different at his first and second trials. At Newell's first trial for deliberate design murder, manslaughter (heat-of-passion or otherwise) was effectively an alternative defense theory that would mitigate the charge to manslaughter. Conversely, at Newell's second trial, the State's main theory of guilt was that Newell was guilty of heat-of-passion manslaughter. Therefore, Newell had a dissimilar motive to develop Hollis' testimony at his second trial, and Hollis' former testimony was inadmissible under Rule 804(b)(1).

While Newell maintains that the evidence at his second trial–including even Hollis' testimony at the first trial–was insufficient to support the verdict, Newell submits that the error in admitting Hollis' former testimony nevertheless prejudiced his defense at the second trial. Therefore, Newell requests this Court to clarify that the State should not be permitted to rely on Hollis' former testimony on remand for a third trial in this matter.

CONCLUSION

Newell respectfully submits that the propositions and authorities cited and briefed above warrant certiorari review of the Court of Appeals decision in this case pursuant to 17(a)(3)(i) and (ii) of the Mississippi Rules of Appellate Procedure. Accordingly, Newell requests this Court to grant this Petition for Writ of Certiorari and issue an opinion reversing his conviction and sentence and rendering a judgment of acquittal in his favor or dismissing the indictment with prejudice and ordering his immediate release. Alternatively, Newell requests this Court to address the evidentiary and jury instruction issues so that the errors do not recur at Newell's third trial in this matter before the Lowndes County Circuit Court.

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
For James C. Newell, Jr., Appellant

BY: /s/ Hunter N. Aikens
Hunter N. Aikens, Miss. Bar 102195
COUNSEL FOR APPELLANT

OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
P.O. Box 3510
Jackson MS 39207-3510
Phone: 601 576-4290
Fax: 601-576-4205
email: haike@ospd.ms.gov

CERTIFICATE OF SERVICE

I, Hunter N. Aikens, Counsel for James C. Newell, do hereby certify that I have this day electronically filed the forgoing **PETITION FOR WRIT OF CERTIORARI** with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Honorable Jim Hood
Attorney General
P. O. Box 220
Jackson MS 39205-0220

So certified, this the 23rdh day of February, 2015.

/s/ Hunter N. Aikens
Hunter N. Aikens, MSB# 102195
COUNSEL FOR APPELLANT

OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
P.O. Box 3510
Jackson MS 39207-3510
Phone: 601 576-4290
Fax: 601-576-4205
email: haike@ospd.ms.gov

APPENDIX A

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

Muriel B. Ellis
Post Office Box 249
Jackson, Mississippi 39205-0249
Telephone: (601) 359-3694
Facsimile: (601) 359-2407

(Street Address)
450 High Street
Jackson, Mississippi 39201-1082

e-mail:sctclerk@courts.ms.gov

September 23, 2014

This is to advise you that the Mississippi Court of Appeals rendered the following decision on the 23rd day of September, 2014.

Court of Appeals Case # 2013-KA-00030-COA
Trial Court Case # 2008-0293-CR1

James C. Newell, Jr. a/k/a James C. Newell a/k/a James Newell a/k/a Chuck Newell v. State of Mississippi

The judgment of the Lowndes County Circuit Court is reversed, and this case is remanded for a new trial consistent with this opinion. All costs of this appeal are assessed to Lowndes County.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *
If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found at www.mssc.state.ms.us under the Quick Links/Supreme Court/Decision for the date of the decision or the Quick Links/Court of Appeals/Decision for the date of the decision.

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2013-KA-00030-COA

JAMES C. NEWELL, JR. A/K/A JAMES C. NEWELL A/K/A JAMES NEWELL A/K/A CHUCK NEWELL — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	09/07/2012
TRIAL JUDGE:	HON. LEE SORRELS COLEMAN
COURT FROM WHICH APPEALED:	LOWNDES COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: HUNTER NOLAN AIKENS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	FORREST ALLGOOD
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF MANSLAUGHTER AND SENTENCED TO TWENTY YEARS, WITH FIFTEEN YEARS TO SERVE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FIVE YEARS SUSPENDED, FOLLOWED BY FIVE YEARS OF POST-RELEASE SUPERVISION, AND TO PAY A $10,000 FINE
DISPOSITION:	REVERSED AND REMANDED - 09/23/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE LEE, C.J., BARNES AND FAIR, JJ.

LEE, C.J., FOR THE COURT:

¶1. This appeal addresses James C. Newell's second trial after the Mississippi Supreme Court in *Newell v. State*, 49 So. 3d 66 (Miss. 2010) (*Newell I*), reversed Newell's first

manslaughter conviction and remanded the case for a new trial.

FACTS AND PROCEDURAL HISTORY

¶2. On April 30, 2008, Newell married his wife, Diane. Within the next two weeks, Newell suspected Diane of cheating on him with Tony Hayes, and had contacted a lawyer about divorcing her. On May 14, 2008, Diane moved out of their home in Vernon, Alabama. Later on that same day, around 5 p.m., Newell telephoned her and left two voice mail messages. In the first message, Newell threatened to "pop a cap" in Diane and Tony; however, in the second message, Newell told Diane that they "were not worth it." Later that night, Newell went to the Slab House, a bar in Lowndes County, Mississippi, to see if Diane was there with Tony.

¶3. When Newell arrived at the Slab House around 9 p.m., he saw Adrian Boyette and Jason Hollis standing near Diane's truck. Newell approached Boyette. Newell testified that he asked Boyette if he knew where the owner of the truck they were standing near was. Several law enforcement officers testified that Newell had told them that he asked Boyette if he was the person who had been answering Diane's phone. The conversation between Boyette and Newell became heated. Newell walked back to his truck, followed by Boyette. As Newell was getting into his truck, Boyette slammed the truck door on Newell's leg. After Newell closed the truck door, Boyette began beating on the hood of the truck, threatening to "[mess him] up." During this time Newell removed the handgun he carried from the glove box and placed it beside him on the seat. Boyette pulled on the driver-side door. Boyette threatened to "cut [Newell] up" and reached for his pocket. Newell grabbed the gun, pushed the door open, and shot Boyette. Newell jumped back in his truck and drove off to his home

in Vernon.

¶4. Police soon arrived at the Slab House and put out a "BOLO," or be on the lookout, for Newell's vehicle. Soon after Newell arrived home, his sister called 911 to report that Newell was outside his house threatening to commit suicide with a gun. Police officers soon responded to the call. Investigator David Sullivan arrived to find Newell outside with a gun to his head, surrounded by other officers. Since Sullivan knew Newell personally, he sat on a bench next to Newell, talked with him, and convinced him to place the gun in his lap. During the conversation, Newell asked the police to check his truck for Boyette's fingerprints and to obtain Diane's cell phone to show that she had been talking to other men. After Sullivan ordered the truck fingerprinted and the phone seized, he was able to convince Newell to give him the gun and surrender peacefully. At trial, Newell testified that he was threatening to kill himself because he did not think anyone would believe that he shot Boyette in self-defense.

¶5. After a three-day trial ending on August 24, 2012, the jury found Newell guilty. On September 7, 2012, Newell was sentenced to twenty years in the custody of the Mississippi Department of Corrections, with five years suspended and fifteen years to serve. Also, the court required Newell to serve five years of post-release supervision and to pay a $10,000 fine. Newell now appeals.

DISCUSSION

¶6. Newell is represented by the Indigent Appeals Division of the Office of the State Public Defender. On appeal, Newell's counsel raised the following six issues: (1) the verdict was not supported by the weight and/or sufficiency of the evidence; (2) the trial court erred

in giving several jury instructions; (3) the trial court erred in allowing Dr. Stephen Hayne to testify that Boyette was in a "guarded position" at the time of the shooting; (4) the trial court erred in allowing evidence of Newell's telephone messages from Diane's phone; (5) the trial court erred in allowing the State to read Hollis's testimony; and (6) the trial court erred in denying Newell's motion to dismiss for a violation of his constitutional right to a speedy trial. Additionally, Newell filed a pro se brief, asserting that his constitutional rights provided by the Fifth Amendment and the Due Process Clause were violated. We find that the trial court erred in allowing Dr. Hayne to testify to the position of Boyette's body at the time of the shooting; therefore, we reverse and remand for a new trial.

¶7. Newell contends that the court erred in allowing Dr. Hayne to testify that the bullet wound was consistent with Boyette being in a guarded position.

¶8. "[T]he admission of expert testimony is within the sound discretion of the trial judge. *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (¶4) (Miss. 2003) (citing *Puckett v. State*, 737 So. 2d 322, 342 (¶57) (Miss. 1999)). The trial judge's discretion must comply with the Mississippi Rules of Evidence. *Ross v. State*, 954 So. 2d 968, 996 (¶56) (Miss. 2007). "Reversal is proper only where such discretion has been abused and a substantial right of a party has been affected. The trial court's discretion must also [e]nsure the constitutional right of the accused to present a full defense in his or her case." *Id.* (internal citations omitted).

¶9. Under Mississippi Rule of Evidence 702, (1) the expert's testimony must be "based upon sufficient facts or data," (2) it must be "the product of reliable principles and methods," and (3) the witness must have "applied the principles and methods reliably to the facts of the

case." The supreme court noted in *Parvin v. State*, 113 So. 3d 1243, 1247 (¶14) (Miss. 2013), that expert opinions

> must rise above mere speculation. Indefinite expert opinions, or those expressed in terms of mere possibilities, are not admissible. For example, we have held that an expert's offering a reasonable hypothesis was insufficient, explaining that expert testimony should be made of sterner stuff.

(Internal citations and quotations omitted).

¶10. At trial, the State questioned Dr. Hayne, asking:

> Q: Okay. And Dr. Hayne, are you familiar with a person being in a guarded position and things of [that] nature?
>
> A: Yes.
>
> Q: Okay. And in terms of this particular position of the entrance and exit wounds, do you have an opinion with respect to that, sir?
>
> A: It certainly is consistent with it.
>
> Q: It would be consistent with the individual seeing a gun pointing at him and putting himself in a - -

Newell's counsel objected to the testimony lacking foundation and being speculative. The court overruled the objection, noting that the defense could bring it out on cross-examination.

¶11. Dr. Hayne then continued:

> A: It would be consistent with that. It's consistent with other things, too, but it's consistent with that.
>
> Q: And would it also be consistent with an individual having their hands raised, based upon the location of the entrance wound?
>
> A: The left upper extremity could not be covering the entrance gunshot wound. It could be raised, it could be behind, it could be markedly forward.

¶12. Prior to testifying about Boyette's position at the time of the shooting, Dr. Hayne

offered no facts or evidence to support his contention that Boyette's singular gunshot wound was consistent with being in a guarded position. The State argues that Hollis testified that he saw Boyette step back with his hands in the air. However, on cross-examination, Hollis stated that the did not see Boyette prior to the shooting; he only looked after he heard the gunshot.

¶13. As the supreme court warned against in *Parvin*, 113 So. 3d at 1247 (¶14), Dr. Hayne testified to a "mere possibility." Dr. Hayne even noted that there were other possibilities as well, stating that Boyette's arm could have been "raised, . . . behind, . . . or markedly forward." Dr. Hayne's testimony regarding Boyette's "guarded position" does not rise above mere speculation, to meet the requirements of Rule 702. Because a substantial right of Newell's was affected, we reverse the conviction and remand the case for a new trial consistent with this opinion. We decline to address the merits of the other issues raised.

¶14. THE JUDGMENT OF THE LOWNDES COUNTY CIRCUIT COURT IS REVERSED, AND THIS CASE IS REMANDED FOR A NEW TRIAL CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO LOWNDES COUNTY.

IRVING, P.J., BARNES, ISHEE, FAIR AND JAMES, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY GRIFFIS, P.J.; ROBERTS AND MAXWELL, JJ., JOIN IN PART.

CARLTON, J., DISSENTING:

¶15. I respectfully dissent. I would affirm the conviction and find no abuse of discretion by the trial court's admission of the expert opinion testimony of Dr. Hayne in this case. The record reflects that the trial court accepted Dr. Hayne as an expert in the field of forensic pathology without objection and that evidence in the record shows Dr. Hayne rendered expert

opinion testimony with a sufficiently reliable and relevant basis falling within the scope of his field of expertise.[1] Dr. Hayne's testimony reflects he relied upon the facts, data, measurements, and findings of his autopsy, internal and external examination, photographs, autopsy body-illustration diagram, and the crime scene to render his expert opinion that the wounds of the victim, Boyette, were consistent with the victim putting himself in a guarded position at the time of the shooting: his hands were raised or sufficiently forward with his chest area exposed where the bullet entered his body.[2]

¶16. Moreover, a review of Dr. Hayne's testimony in context in the record shows no abuse of discretion by the trial court in the admission of Dr. Hayne's expert opinion testimony. After being accepted as an expert in forensic pathology and also after describing the scope of that field, Dr. Hayne described the trajectory of the bullet wounds as determined from his autopsy. As acknowledged, Dr. Hayne relied upon his autopsy photographs, findings, and body-illustration diagram taken at the time of his autopsy of Boyette to assist in illustrating and explaining his testimony. The autopsy photographs and the body diagram showed the entrance and exit wounds suffered by Boyette.

¶17. The details of his testimony reflect that Dr. Hayne described the protocol for forensic autopsies, and then described his findings from the autopsy in this case, as he followed

---

[1] *See* M.R.E. 702 & 703; *Galloway v. State*, 122 So. 3d 614, 632 (¶29) (Miss. 2013).

[2] *See Ford v. State,* 975 So. 2d 859, 866-67 (¶¶24-26) (Miss. 2008) (treating physician's testimony did not mislead jury); *Berry v. State*, 980 So. 2d 936, 942 (¶21) (Miss. Ct. App. 2007), *cert denied*, 979 So. 2d 691 (Miss. 2008) (finding that an expert forensic pathologist's opinion as to the manner and cause of victim's death was not a legal conclusion, as he merely presented facts of which he was aware and gave his expert opinion as to the cause of death).

protocol, showing the bullet path and describing the wound as entering the body from the left and traveling to the right of the body on a downward twenty-degree trajectory. In so doing, he described a small abrasion or scrape of the skin located over the upper part of the forehead and slightly to the right, just below the hairline, measuring one and one-quarter inches. He also described an entrance gunshot wound on the left flank at a point nineteen and one-half inches below the top of the head and six inches forward from the back, or far-left chest wall. He described the entrance wound as circular, measuring three-eights of an inch in diameter. He described an elliptical-shaped exit gunshot wound located on the far-right side of the back and found at a point twenty-three and one-half inches below the top of the head and eight inches on the right side of his back, or far right.

¶18. Without objection, Dr. Hayne testified that the significant finding of his autopsy was the wound tract coursing across the body, going from left to right and slightly down, going towards the back. Dr. Hayne further testified as to his findings regarding the injuries suffered internally relative to the bullet path, stating that the bullet entered the body between the sixth and seventh ribs through the intercostal muscles on the far-left side. Dr. Hayne explained that the bullet went through that muscle tissue, not striking either the sixth or seventh rib, and went through the diaphragm, a muscle separating the chest cavity from the abdominal cavity. He testified that the bullet also went through the aorta and pancreas, located just behind the abdominal cavity. The bullet also went through the liver and then the right kidney. The bullet then struck the ninth rib, partially fracturing the lower part of the ninth rib, and then exited the body. He also testified to the volume of blood loss to Boyette's vascular system. Significant to the position of the victim's body, Dr. Hayne testified that the

bullet path is determined by the initial travel of the bullet and that the bullet could change course slightly as it travels through the body. He gave his opinion that the wound tract was left to right, going down at approximately twenty degrees, and going towards the back at approximately twenty degrees.

¶19. The State then asked Dr. Hayne if the entrance and exit wounds in this case were consistent with a person being in a guarded position, and Dr. Hayne explained that, in his opinion, the wounds were indeed consistent with a person positioning himself in a guarded manner. When asked whether Boyette's bullet wound was consistent with Boyette "seeing a gun pointing at him," Dr. Hayne answered, "It would be consistent with that. It's consistent with other things, too, but it's consistent with that." The record reflects that Dr. Hayes opined that the wound tract would be consistent with a person in a guarded position with his hands raised, based upon the location of the entrance wound, because the bullet entered through the upper-left chest wall. He explained that the upper-left extremity could not be covering the entrance gunshot wound. *See Galloway*, 122 So. 3d at 632 (¶29) ("[A] forensic pathologist may testify as to what produced a victim's injuries and what trauma such an injury would produce[,]" and may also testify about wounds, suffering, and the means of infliction of injury, since these matters fall within his or her area of expertise.).

¶20. The record reflects a reliable and sufficient evidentiary foundation was laid before the State elicited Dr. Hayne's expert opinion now at issue. Significant to the issues before the court, the trial court admitted both the autopsy photographs and the autopsy body-illustration diagram into evidence without any objection. Newell also failed to object to Dr. Hayne's testimony as to his significant findings relative to the internal injuries or bullet trajectory, and

as previously acknowledged, Newell raised no objection to the trial court's acceptance of Dr. Hayne as an expert in the field of forensic pathology.

¶21. The record reflects that after qualification and acceptance of Dr. Hayne in the field of forensic pathology by the trial court, Dr. Hayne's testimony then laid the foundation for the scope of his field of expertise and for his expert opinions in this case. *See* M.R.E. 702. He testified as to multiple tasks in the field of forensic pathology, including performing post-mortem examinations and medical autopsies, as well as interpreting records, data, toxicology reports, scene-investigation reports, and also conveying that information to families, courts, and attorneys. Newell raised no objection to Dr. Hayne's testimony about the multiple tasks falling within the field of forensic pathology. The record reflects that the State elicited a sufficient evidentiary foundation to show that Dr. Hayne's expert opinion fell within the scope of his expertise.

¶22. This Court has acknowledged that trial courts in this state routinely allow forensic pathologists to offer opinion testimony regarding the position of the victim. *White v. State,* 964 So. 2d 1181, 1185-86 (¶11) (Miss. Ct. App. 2007); *Williams v. State*, 964 So. 2d 541, 547-48 (¶25) (Miss. Ct. App. 2007) (Dr. Hayne's testimony was properly admitted where he opined as to the position of the defendant's body in relation to the gun, since he was properly recognized as a forensic expert.). I submit that the record reflects no abuse of discretion in the admission of Dr. Hayne's expert opinion testimony by the trial court since the record reflects that this expert testimony possessed a reliable factual foundation based upon information from his autopsy findings, autopsy photographs, internal and external examinations, an autopsy body-illustration diagram, established protocol in his field, and his

expertise as an expert in forensic pathology.[3]

¶23. The record reflects a clear evidentiary foundation for Dr. Hayne's expert opinion. The record reflects that the evidence upon which Dr. Hayne based his expert opinion was admitted into evidence by the trial court without objection prior to his expert opinion testimony at issue. Additionally, the evidence presented at trial supported Dr. Hayne's expert opinion by showing the twenty-degree entrance and downward exit-wound path that crossed the victim's body. *See Darnell v. Darnell*, 2012-CA-01503-SCT, 2014 WL 1632246, at *9 (¶27) (Miss. Apr. 24, 2014).[4] The record reflects that Dr. Hayne's opinion testimony at issue here met the requirements of relevancy and reliability, which are required of expert opinion testimony by precedent and our rules of evidence.[5] *See* M.R.E. 401 & 402 (relevant evidence); *see also* M.R.E. 702 & 703 (expert opinion testimony). In addressing the issue

---

[3] *See Pitchford v. State*, 45 So. 3d 216, 246 (¶129) (Miss. 2010) (finding Dr. Hayne's testimony to be within the scope of forensic pathology when he testified that the wounds were consistent with the victim being shot up to three times with a handgun containing rat shot, five times with a .22 caliber weapon, and one to four times with the defendant's .38 caliber weapon); *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 36 (¶11) (Miss. 2003) (The trial court sits as the gatekeeper to assess whether the reasoning or methodology of expert testimony is relevant, reliable and applies to the facts of the case.).

[4] In *Darnell*, 2014 WL 1632246, at *9 (¶27) (citation omitted), the Mississippi Supreme Court recognized that "the scope of permissible expert testimony under Rule 702 includes an expert's opinion that the alleged victim's characteristics are consistent with those of children who have been sexually abused."

[5] *See McLemore*, 863 So. 2d at 36 (¶11). In *McLemore*, the Mississippi Supreme Court applied a modified *Daubert* analysis requiring expert opinion testimony to be both relevant and reliable. *Id.* The court held that "[t]he trial judge determines whether the testimony rests on a reliable foundation and is relevant in a particular case[,]" explaining that "[t]here must be a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* The *McLemore* court also stated that "[t]he party offering the expert's testimony must show that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation." *Id.*

at bar, we must acknowledge that the trial court sits as the gatekeeper to assess whether the reasoning or methodology of expert testimony is relevant, reliable, and applies to the facts of the case. *See McLemore*, 863 So. 2d at 36 (¶11).[6]

¶24. The majority considers Dr. Hayne's testimony to be speculative. However, as stated, the record reflects that Dr. Hayne based his opinion upon findings resulting from his autopsy examination, as well as protocol normally used by those in his field. In *Darnell*, the Mississippi Supreme Court addressed expert opinion testimony, finding that

> Mississippi Rule of Evidence 703 permits an expert witness to base an opinion on facts, data, or opinions presented to the expert outside of court, without regard to whether such information has been or will be admitted . . . . However, such information must be of a type reasonably relied upon by experts in their discipline in forming opinions or inferences upon the subject.

Darnell, 2014 WL 1632246, at *10 (¶30). In comparison, the *Darnell* opinion explained that the scope of permissible expert testimony under Mississippi Rule of Evidence 702 included an expert's opinion that an alleged victim's characteristics were consistent with those of one who had been sexually abused. *See Pitchford v. State*, 45 So. 3d 216, 246 (¶129) (Miss. 2010); *See also Elkins v. State*, 918 So. 2d 828, 831-32 (¶9) (Miss. Ct. App. 2005).[7]

¶25. "The standard of review applied to a trial judge's admission or exclusion of evidence and testimony is abuse of discretion." *Carpenter v. State*, 132 So. 3d 1053, 1055 (¶5) (Miss.

---

[6] Appellate courts review the admission or exclusion of expert opinion testimony for abuse of discretion. *Abernathy v. State*, 30 So. 3d 320, 329 (¶36) (Miss. 2010); *Puckett v. State*, 737 So. 2d 322, 342 (¶57) (Miss. 1999).

[7] *See generally Gary v. State*, 11 So. 3d 769, 772 (¶¶10-11) (Miss. Ct. App. 2009).

Ct. App. 2013).[8] I respectfully submit that a review of the record reflects no abuse of discretion by the trial court in its admission of Dr. Hayne's opinion testimony at issue in this case. Accordingly, I must respectfully dissent from the majority's opinion.

GRIFFIS, P.J., JOINS THIS OPINION. ROBERTS AND MAXWELL, JJ., JOIN THIS OPINION IN PART.

---

[8] *See also Carpenter*, 132 So. 3d at 1057-58 (¶¶12-14); *Young v. State*, 106 So. 3d 811, 819 (¶¶18-19) (Miss. Ct. App. 2011) (testimony that victim's wounds were consistent with blunt force penetrating trauma of vaginal and anal area was not improper expert opinion testimony by nurse).

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES C. NEWELL, JR. **APPELLANT**

V. **NO. 2013-KA-00030-COA**

STATE OF MISSISSIPPI **APPELLEE**

MOTION FOR REHEARING

OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
Hunter N. Aikens, MBN. 102195
Post Office Box 3510
Jackson, Mississippi 39207-3510
Telephone: 601-576-4290

Counsel for James C. Newell, Jr.

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES C. NEWELL, JR. **APPELLANT**

V. **NO. 2013-KA-00030-COA**

STATE OF MISSISSIPPI **APPELLEE**

MOTION FOR REHEARING

COMES NOW the Appellant, James Newell, by and through counsel, pursuant to Rule 40 of the Mississippi Rules of Appellate Procedure, and moves this Honorable Court to grant rehearing of its decision handed down in this matter on September 23, 2014. In support thereof, Newell would show unto this Court the following.

STANDARD OF REVIEW

Rule 40 of the Mississippi Rules of Appellate Procedure provides that "the motion for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain[.]" M.R.A.P. 40. Rule 40 further provides that "[t]he motion shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misapprehended. . . ." *Id.*

ARGUMENT

This Court's opinion reverses Newell's manslaughter conviction and remands for a new trial, finding error in the admission of speculative expert testimony that the victim was in "guarded position" when he was shot. Opinion at ¶¶6-14. As the opinion acknowledges, this was one of six issues counsel raised on Newell's behalf. Opinion at ¶6. The opinion did not address the remaining

five issues. Newell respectfully requests this Court to grant rehearing to address the remaining five issues.

The remedy for two of the remaining five issues–namely, insufficient evidence and speedy (re)trial–would be, if Newell prevailed, for this Court to reverse and *render* the conviction or *dismiss* the charges. *See Bush v. State*, 895 So. 2d 836, 843 (¶16) (Miss. 2005) ("the proper remedy [for insufficient evidence] is for the appellate court to reverse and render.") (citation omitted); *Taylor v. State*, 672 So. 2d 1246, 1262 (Miss. 1996) ("The sole remedy for the denial of a defendant's right to a speedy trial is dismissal of the charges. . . .") (citation omitted). Because the opinion *remands* this case without considering the insufficiency of the evidence or the violation of Newell's right to speedy retrial, Newell contends that rehearing is appropriate to address those issues.

The remaining three overlooked issues–i.e., the grant of several jury instructions, allowing evidence of Newell's telephone messages, and allowing the State to read Hollis' prior testimony–should appropriately be addressed in this direct appeal, as these issues are likely to arise again on remand. *See generally, e.g., Brooks v. State*, 763 So. 2d 859, 864 (¶15) (Miss. 2000); *Clark v. State*, 127 So. 3d 292, 296 (¶9) (Miss. Ct. App. 2013). Accordingly, Newell contends alternatively that rehearing is appropriate to address these issues.

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

The evidence in this case was insufficient to establish beyond a reasonable doubt that Newell did not shoot Boyette in justifiable self defense as defined by the Castle Doctrine and its presumption of reasonable fear. The proper remedy is for this Court to reverse and render "[if] the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have

found beyond a reasonable doubt that the defendant was guilty[.]'" *Bush v. State*, 895 So. 2d 836, 843 (¶16) (Miss. 2005) (quoting *Edwards v. State*, 469 So. 2d 68, 70 (Miss. 1985)).

The defense of self defense is addressed in Mississippi Code Annotated Section 97-3-15, which provides in pertinent part that a killing "shall be justifiable in the following cases:"

> (e) When committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or upon or in . . . any occupied vehicle . . . or in the immediate premises thereof in which such person shall be;
>
> (f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished;

Miss. Code. Ann. § 97-3-15(1)(e) and (f).

The Castle Doctrine, addressed by Mississippi Code Section 97-3-15(3)-(4), further provides that "[a] person who is not the initial aggressor and is not engaged in unlawful activity shall have no duty to retreat before using deadly force under subsection (1)(e) or (f) of this section if the person is in a place where the person has a right to be. . . ." Miss. Code Ann. § 97-3-15(4) (Rev. 2006). In this case, Newell certainly had a right to be in his own truck. The evidence also clearly established that Newell had not engaged in unlawful activity by asking Boyette and Hollis why they were standing next to his wife's truck and if they knew her, and walking away back his [Newell's] own truck. (Tr. 217-18, 501-02). The evidence also firmly established that Boyette–by pursuing Newell to his truck, slamming the door on his legs, and continually beating on the truck while threatening "I'm fixing to F you up."–was the initial aggressor. (Tr. 220-21, 228-29, 502-03). Thus, Newell had no duty to retreat.

More significantly, the Castle Doctrine creates a statutory presumption that "[a] person who uses defensive force shall be presumed to have reasonably feared imminent death or great bodily

harm, or the commission of a felony upon him or . . . against a vehicle which he was occupying" under certain circumstances. Miss. Code. Ann. § 97-3-15(3) (Rev. 2006) (emphasis added). Namely, to the extent relevant to this case, Section 97-3-15(3)'s statutory presumption of reasonable fear applies if:

> (1) the person against whom the defensive force was used, was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered, . . . [an] occupied vehicle . . . or
>
> (2) that person had unlawfully removed or was attempting to unlawfully remove another against the other person's will from that . . . occupied vehicle . . . and
>
> (3) the person who used defensive force knew or had reason to believe that the forcible entry or unlawful and forcible act was occurring or had occurred.

Mississippi Code Annotated §97-3-15(3).

The evidence before the jury in this case fell squarely within these circumstances. Hollis–Boyette's friend of twenty years and the only eyewitness–admitted that he saw Boyette walk to Newell's truck and slam the door on his leg, and this was the only act of aggression he witnessed before hearing the shot. (Tr. 220-21, 229). Hollis testified that he remained at Boyette's truck, he heard "a heated argument " and Boyette "wasn't backing down;" but Hollis admittedly quit watching before he heard the shot. (Tr. 219, 227-30). Newell testified that, after Boyette followed him to his truck, slammed the door on his leg(s), and continually beat on Newell's truck while threatening "I'm fixing to F you up," Boyette "start[ed] pulling the door handle open." (Tr. 503-04, 530-31). The evidence, thus, established that Boyette attempted to forcibly enter Newell's vehicle and/or attempted to remove Newell from it and that Newell had reason to believe that the same was occurring or had occurred. Newell also testified that when he pushed on the door in an attempt to back Boyette away, Boyette threatened "I'm fixing to cut you up" while grabbing for the knife in his pocket, and Newell grabbed his pistol and shot Boyette one time. (Tr. 503-04, 530-31). Both

Newell and Hollis (by transcript) testified that Newell was "inside the door" and "in the doorway" of his truck when the shot was fired.[1] (Tr. 221, 535).

In *Matthews v. City of Madison*, 143 So. 3d 571 (Miss. 2014), the Court recently clarified that "the application of the presumption *does not depend on the existence of reasonable fear in the defendant*; rather, the presumption applies if one of the circumstances in subsection (3) is met." *Matthews v. City of Madison*, 143 So. 3d 571, 574 (¶8) (Miss. 2014) (citing *Newell v. State*, 49 So. 3d 66 (Miss. 2010)) (emphasis added). Newell's testimony established that he shot Boyette while Boyette was attempting to forcibly enter his vehicle and/or attempting to forcibly remove Newell from it. Hollis' testimony simply did not supply a resonable basis for the jury to find otherwise; in fact, Hollis admitted that he quit watching the incident before hearing the shot–which he did not see–and he only saw Boyette falling back with his hands in the air. (Tr. 221-22, 227-30).

The facts and inferences from the evidence presented in this case are such that no resonable juror could find beyond a resonable doubt that Newell did *not* shoot Boyette in justifiable self defense under the castle doctrine. No resonable juror could find beyond a reasonable doubt that the presumption of resonable fear did not apply and that Newell's killing of Boyette was not justified under the Castle Doctrine. Through the Castle Doctrine, our legislature has provided exceptional legal protection to those who use deadly force under certain circumstances. Those circumstances plainly existed in this case. Newell submits that this Honorable Court should apply the Castle Doctrine to this case, grant this motion for rehearing and reverse and remand this case.

II. THE TRIAL COURT ERRED IN GRANTING SEVERAL JURY INSTRUCTIONS.

---

[1] In *Newell I*, the Court clarified that the statutory presumption applies to persons who are, not only in their vehicle, but also "in the immediate premises thereof." *Newell*, 49 So. 3d at 76-77 (¶30).

Newell submits that retrial is likely to produce the same or a similar labyrinth of instructions that will again mislead and confuse the jury. Accordingly, Newell requests this Court to grant rehearing to address the challenged instructions to facilitate retrial and provide guidance to the trial court on remand.

Instruction S-5A

The trial court erred in granting instruction S-5A because it was not supported by the evidence. Instruction S-5A read as follows:

> The Court instructs the Jury that if you find from the evidence in this case beyond a resonable doubt that:
>
> (1) On May 14, 2008, the victim, Adrian Boyette, was the initial aggressor, but that he withdrew from the aggression and retreated;
>
> (2) and that thereafter on May 14, 2008, the Defendant, JAMES C. NEWELL, JR., in Lowndes County, Mississippi;
>
> (3) did become the aggressor and unnecessarily kill Adrian Boyette;
>
> (4) not in necessary self defense;
>
> Then you shall find the Defendant guilty of Manslaughter. If the prosecution has failed to prove any of the above listed elements beyond a reasonable doubt, then you shall find JAMES C. NEWELL, JR., not guilty of Manslaughter.

(C.P. 161, Tr. 601, R.E. 12). "'The general rule is that all instructions must be supported by the evidence; an instruction not supported by the evidence should not be given.'" *Conerly v. State*, 879 So. 2d 1101, 1108-09 (¶28)(Miss. Ct. App. 2004) (quoting *Haggerty v. Foster*, 838 So. 2d 948, 954 (¶14) (Miss. 2002)).

In the instant case, there was no evidence that Boyette retreated and Newell had become the aggressor. The evidence established that Boyette—by following Newell to his truck, slamming the door on his legs, beating on the truck while threatening "I'm fixing to F you up," pulling the door

handle of Newell's truck, and reaching for his pocket while threatening "I'm about to cut you up"–was the initial aggressor and remained the aggressor. The only aggression that Newell arguably undertook was shooting Boyette and, just before the shot, attempting unsuccessfully to push Boyette away from his truck as Boyette grabbed the handle and tried to pull the door open. These acts, however, did not transform Newell into the aggressor; they were acts of self defense justified under the Castle Doctrine. Hollis' testimony that he saw Boyette step back with his hands in the air when he (Hollis) heard the shot and looked up is insignificant. It is undisputed that Boyette fell when he was shot. Even assuming that, as Boyette saw a gun being fired at him, he threw his up in instantaneous realization that his aggression had prompted Newell to shoot him, this would not change the undisputed fact that it did. The evidence was insufficient to support a reasonable finding that Boyette had somehow withdrawn and retreated and that Newell had become the aggressor.

Instruction S-3A

Instruction S-3A was improper as an impermissible comment on the weight of the evidence. Instruction S-3A provided:

> The Court instructs the Jury that "the heat of passion" is a state of violent and uncontrollable rage engendered by a blow, or certain other provocation given. This passion or anger must be suddenly aroused at that time by some immediate and reasonable provocation, by the words or acts of the victim at the time. *Therefore, if you find from the evidence beyond a reasonable doubt that Adrian Boyette, at the time of his killing, did offer some immediate and resonable provocation, by words or acts, to JAMES C. NEWELL, JR., then the killing was "in the heat of passion.*

(C.P. 154, Tr. 630, R.E. 10) (emphasis added).

Instruction S-3A, impermissibly commented on the weight of the evidence and improperly gave undue emphasis to particular evidence.[2] "[T]he trial judge should not give undue prominence

[2] Moreover, this particular evidence–Boyette's aggressive acts–was the same evidence that actually supported Newell's defense of self-defense.

to particular portions of the evidence in the instructions." *Sanders v. State*, 586 So. 2d 792, 796 (Miss. 1991) (citing Miss. Code Ann. § 99-17-35 (1972)). Such instructions are improper. *Id.* (citing *Duckworth v. State*, 477 So. 2d 935, 938 (Miss. 1985)). *See also, Gordon v. State*, 95 Miss. 543, 49 So. 609 (1909) (finding an instruction erroneous because "it charges that they may find the defendant guilty if they simply believe so and so.").

Instruction S-4

Instruction S-4 presented the jury with a crime not cognizable under Mississippi law; it improperly stated the law and mislead the jury; and it impermissibly undercut Newell's defense. Instruction S-4 stated:

> The Court instructs the Jury that if you find from the evidence in this case beyond a reasonable doubt that:
>
> 1. James C. Newell, Jr., on or about May 14, 2008, in Lowndes County, Mississippi;
>
> 2. did unnecessarily kill Adrian Boyette;
>
> 3. and not in self-defense;
>
> 4. while Adrian Boyette was engage [sic] in the perpetration of any crime or misdemeanor not amounting to a felony, or while Adrian Boyette was in the attempt to commit any crime or misdemeanor;
>
> Then you shall find the Defendant guilty of manslaughter . . . .

(C.P. 156, R.E. 11).

By instructing the jury that Newell was guilty of manslaughter if he killed Boyette while *Boyette*–not Newell–was committing a misdemeanor, Instruction S-4 presented the jury with an inverse application of misdemeanor manslaughter under Section 97-3-29, which provides:

> The killing of a human being without malice, by the act, procurement, or culpable negligence of another, *while such other is engaged in the perpetration of any crime or misdemeanor not amounting to felony, or in the attempt to commit any crime or misdemeanor*, where such killing would be murder at common law, shall be

manslaughter.

Miss. Code. Ann. § 97-3-29 (emphasis added).

"[T]he trial court does not have the power to fashion a new crime." *Shaffer v. State*, 740 So. 2d 273, 283 (Miss. 1998) (quoting *Windham v. State*, 602 So. 2d 798, 807 (Miss. 1992) (Robertson, J., concurring). Boyette's forcible attempts to enter Newell's vehicle and remove him from it, did not make Newell guilty of misdemeanor manslaughter; they rendered Newell's killing of Boyette justifiable under the Castle Doctrine.

Instruction S-1

The error in presenting the jury with an insufficient ground for conviction in instruction S-4 gave rise to further instructional error in the grant of Instruction S-1, a general form of the verdict instruction, which directed the jury that:

> The Court instructs the Jury that if you find the Defendant guilty as charged, the form of your verdict should be as follows:
>
> "We, the Jury find the Defendant guilty as charged."
>
> The Court instructs the Jury that if you find the Defendant not guilty, the form of your verdict should be as follows:
>
> "We, the Jury find the Defendant not guilty."
>
> You should write your verdict on a separate piece of paper.

(C.P. 153, R.E. 9). In turn, the jury returned a general verdict stating, "We, the Jury find the defendant guilty as charged." (C.P. 179, R.E. 14). This verdict was insufficient and must be set aside, as it fails to convey which of the several grounds the jury's verdict rested.

"In criminal cases if different counts are charged in the indictment or if the court instructs the jury as to related or lesser offenses, the jurors *shall*, if they convict the defendant, make it appear by their verdict on which counts or of which offenses they find the defendant guilty." U.R.C.C.C.

3.10 (emphasis added). "The basic test with reference to whether or not a verdict is sufficient as to form is whether or not it is an intelligent answer to the issues submitted to the jury and expressed so that the intent of the jury can be understood by the court." *Coles v. State*, 756 So.2d 12, 14(¶ 12) (Miss. Ct. App. 1999). More specifically, where "a jury has been instructed that it may rely on any one of two or more independent grounds, and one of those grounds is insufficient, a subsequent general verdict of guilty must be set aside *because the verdict may have rested exclusively on the insufficient ground.*" *Phillips v. State*, 493 So. 2d 350, 355 (Miss. 1986) (emphasis in original) (citing *Stromberg v. California*, 283 U.S. 359, 369-70, 51 S.Ct. 532, 535-36 (1931); *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064 (1957); *Zant v. Stephens*, 462 U.S. 862, 881, 103 S.Ct. 2733, 2744 (1983)).

Instruction S-1 requested and produced a general verdict. It remains unknown to this day which of the several theories the jury considered Newell guilty of. Because the verdict may have rested on the insufficient ground presented in instruction S-4, the trial court's grant of instruction S-1 was error, and this Court should grant rehearing to clarify the instructional error in this case.

IV. THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF NEWELL'S TELEPHONE MESSAGES FROM HIS WIFE'S PHONE.

The trial court erred in allowing the State to introduce evidence of Newell's two phone messages that he left on his wife's cell phone, in which Newell (1) first told Dianne he was going to "pop a cap" in her and a man named Tony and (2) quickly recanting, "Nevermind. Neither of you are worth it." (Tr. 496-98). Newell's messages were inadmissible under Mississippi Rules of Evidence 401 and 402 because they were irrelevant as to whether he shot Boyette in self defense or in the heat of passion upon sudden provocation that arose after Newell left the messages. The messages also constituted inadmissible prior bad acts evidence that was more prejudicial than probative under Rules of 404(b) and 403.

In *Newell I*, the Court determined that Newell's voice messages were relevant to the State's

theory of deliberate-design murder; however, the Court expressly made "no findings on their relevance or probative value in further proceedings." *Newell*, 49 So. 3d at 72 (¶13). Although the messages may have possessed sufficient relevance to the State's theory of deliberate design murder at Newell's first trial, they were not relevant at Newell's second trial where the State's theory was that Newell shot Boyette in the heat of passion upon sudden provocation.

"[E]vidence in criminal trials must be 'strictly relevant to the particular offense charged.'" *United States v. Jackson*, 339 F.3d 349, 354 (5th Cir. 2003) (quoting *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083 (1949)). Evidence of difficulties between the defendant and third parties is generally inadmissible. *See generally, e.g., Russell v. State*, 607 So. 2d 1107, 1116 (Miss. 1992) (citing *Carter v. State*, 167 Miss. 331, 145 So. 739 (1933)). Newell's messages to Diane involved a prior collateral threat related to difficulties between Newell and a third party not involved in the shooting. The messages prejudiced Newell's defense by inviting the jury to attribute Newell's general hostility toward Dianne and Tony to a third person (Boyette) that Newell shot for different reasons that arose after he left the messages.

Newell's phone messages were irrelevant at his second trial for heat of passion manslaughter. At a third trial, it is likely that the State will again attempt to introduce the messages to prejudice Newell's defense to a extremely weak prosecutorial case.

V. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO READ HOLLIS' PRIOR TESTIMONY IN LIEU OF HIS PRESENCE.

The trial erred in finding that Hollis' testimony from Newell's first trial for deliberate design murder was admissible at Newell's second trial for heat of passion manslaughter under Mississippi Rule of Evidence 804(b)(1)–the "former testimony" exception to the hearsay rule. Former testimony is not admissible under Rule 804(b)(1) unless "[t]he party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." M.R.E. 804(b)(1). Newell's motives to cross-examine Hollis at his first and

second trials were opposite as to heat of passion manslaughter.

At Newell's first trial for deliberate design murder, heat of passion manslaughter was an alternate theory of defense that would mitigate murder to manslaughter in the event the jury rejected his claim of self defense. As the Reply Brief of the Appellant notes, Newell actually requested a heat of passion manslaughter instruction at his first trial, but the trial court denied it finding insufficient evidence to support it. *See* Reply of the Appellant at p. 14. Thus, at Newell's first trial, his motive to develop Hollis' testimony by cross-examination was not only to establish that he acted in self defense, but also to establish the alternative defense that he shot Newell in the heat of passion and was guilty only of manslaughter.

However, at Newell's second trial, the State's theory was that Newell shot Boyette in the heat of passion and was guilty of manslaughter. Newell's motive for cross-examining Hollis at his second trial–had he been afforded the opportunity–would have been to negate that he shot Boyete in the heat of passion. Accordingly, Newell did not have a similar motive to cross-examine Hollis at his second trial; he had an opposite motive.

The trial court, therefore, erred in allowing the State to read Hollis' transcript from the first trial under Rule 804(b)(1). Newell requests this Court to grant rehearing and clarify that the State should not be permitted to rely on Hollis' former testimony on remand.

VI. THE TRIAL COURT ERRED IN DENYING NEWELL'S MOTION TO DISMISS FOR VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The timeliness of retrial is "measured . . . under the constitutional right to a speedy trial as enunciated in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972)." *Stevens v. State*, 808 So. 2d 908, 915 (¶16) (Miss. 2002) (citing *Carlisle v. State*, 393 So.2d 1312, 1314 (Miss.1981)). Four factors are considered: "(i) length of the delay, (ii) reason for the delay, (iii) defendant's assertion of his right, and (iv) prejudice to the defendant." *Flora v. State*, 925 So. 2d 797, 815 (¶60) (Miss.

2006).

1. Length of the delay

The speedy retrial clock began to run on December 23, 2010, when the Supreme Court's mandate in Newell I was entered. *See Stevens*, 808 So. 2d at 916 (¶18) (citing *Duplantis v. State*, 708 So. 2d 1327, 1334 (Miss. 1998)) (speedy retrial clock begins on date Court enters mandate reversing first conviction). Newell's second trial did not begin until August 21, 2012– some 600 days later. This delay greatly exceeds eight (8) months, therefore, it is presumptively prejudicial and triggers a balancing of the remaining *Barker* factors. *See State v. Woodall*, 801 So. 2d 679, 681-82 (¶¶11-13) (Miss. 2001). This factor weighs in Newell's favor.

2. Reason for the Delay

Where the delay is presumptively prejudicial, "the burden shifts to the prosecution to produce evidence justifying the delay . . . ." *State v. Ferguson*, 576 So. 2d 1252, 1254 (Miss. 1991). Trial was initially set for February 22, 2011; on March 3, 2011, Newell agreed to a continuance resetting trial for May 16, 2011, because he was still awaiting a copy of the transcripts from the first trial. (See, C.P. 189-90, Supp. C.P. 1). This 82-day delay should, at worst, be weighed equally against the State and Newell, as Newell could not obtain the transcripts until the trial court provided them.

On May 27, 2011, an order resetting trial for August 16, 2011,was entered for the reason that the prosecutor had another trial scheduled. (C.P. 190; Supp. C.P. 2). While "overcrowded courts" is "a more neutral reason" for a delay, it is nevertheless weighed against the State, as "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192.

On November 1, 2011, Newell filed a motion for recusal, which was granted two days later. (C.P. 21, 24). The circuit clerk's docket indicates that a notice of trial setting was entered the same

day; however, it does not indicate the reset date, if any. On February 27, 2012, an order was entered resetting trial for May, 29, 2012, for the stated reason that "the court was unable to resolve and the Defendant filed new dispositive motions that were not heard this term." (Supp. C.P. 3). The delay caused by Newell's motions and the trial court's inability to resolve them should at worst be weighed equally. *See generally, Perry v. State*, 637 So. 2d 871, 875 (Miss. 1994) ("Negligence causing delay must also be weighed against the state, albeit not heavily.") (citation omitted); *Poole v. State*, 826 So. 2d 1222, 1228 (Miss. 2002) ("Motions made and granted on behalf of the defense are charged against them.") (citation omitted).

On May 29, 2012, as Newell and a jury venire were present awaiting trial, the State announced for the first time that it wished to use the transcripts of two witnesses–including Jason Hollis. (Tr. 47-49; see also, C.P. 4). Newell objected, and the parties "agreed" to a continuance for State to procure Hollis's presence. (Tr. 51-52, 63-63). An order denying Newell's motions to dismiss for failure to provide a speedy trial was entered the same day. (C.P. 78-79). Three days later–on June 1, 2012–an order was entered resetting trial for August 21, 2012 for the stated reason that, "It appearing to the Court that an Indictment has been filed against the defendant . . . the above styled and numbered cause should be set for trial . . . ." (C.P. 80). The Court's stated reason is curious, given that no new indictment was ever filed despite Newell's demand for a new indictment. (See C.P. 30). Trial finally commenced on August 21, 2012. (Tr. 104).

The delay caused by the State's inability to procure Hollis' presence at trial should not be weighed against Newell. Generally, "a missing witness is a valid reason justifying *appropriate* delay," *McBride v. State*, 61 So. 3d 174, 180 (¶13) (Miss. Ct. App. 2010) (citation omitted) (emphasis added). However, the State waited roughly seventeen months to bring Hollis' unavailability to Newell's and the trial court's attention. The State offered no evidence that Newell caused Hollis' absence, and Newell's refusal to acquiesce in the State proceeding against him

without the presence of the only eyewitness should not weigh against him. Instead, this delay should weigh against the State. *See Jenkins v. State*, 607 So. 2d 1137, 1139 (Miss. 1992) ("[w]here the defendant has not caused the delay and the State does not show good cause for that delay, this Court weighs this factor against the prosecution.") (citation omitted). Ultimately, "[a] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." *Barker*, 407 U.S. at 527, 92 S. Ct. at 2190. Newell submits that the bulk of the 600-day delay in bringing him to court for retrial was not attributable to him and should be weighed against the State. Accordingly, Newell submits that this factor weighs in his favor.

3. Defendant's assertion of the right

Trial counsel filed a demand for speedy trial on September 2, 2011–approximately 159 days after the mandate in *Newell I.* (C.P. 9). Thus, Newell timely asserted his right to a speedy trial within the eight-month threshold. Two motions to dismiss were also filed; one *pro se* on April 3, 2012, and one by counsel on May 24, 2012. (C.P. 60-62, Supp. C.P. 4). "[W]here the defendant asserts his right to a speedy trial, 'he gains far more points' under this prong of Barker." *Johnson v. State*, 68 So. 3d 1239, 1242-43 (¶10) (Miss. 2011) (quoting *Thomas v. State*, 48 So. 3d 460, 476 (Miss. 2010)). This factor weighs in Newell's favor.

4. Prejudice to the defendant

In assessing prejudice or impairment of the defense, "[w]e look to such questions as whether witnesses have died or become unavailable . . . or memories have dimmed so that the accused is at a disadvantage which would not have attended him at a prompt trial." *Jaco v. State*, 574 So. 2d 625, 632 (Miss. 1990) (citation omitted). "If witnesses die or disappear during a delay, the prejudice is obvious." *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193. In this case, Hollis disappeared.

This prejudiced Newell, in that, his defense was impaired and limited by his inability to confront Hollis, the only eyewitness to the incident. Moreover, the State was allowed to use the

transcript of Hollis's testimony from Newell's first trial, at which the State's theory was deliberate design murder and Newell cross-examined Hollis with an eye toward establishing heat of passion to mitigate murder to manslaughter. At Newell's second trial, the State's theory was heat of passion manslaughter, and Newell was stuck with Hollis' prior testimony and unable to cross-examine him in light of the parties different strategic postures. Newell's defense was prejudiced. This factor weighs in his favor.

CONCLUSION

Newell respectfully submits that the foregoing propositions warrant rehearing and requests that this Honorable Court withdraw its opinion handed down on September 23, 2014, and substitute a new opinion reversing and rendering Newell's conviction and sentence or dismissing the charges against him. Alternatively, Newell requests this Court to grant rehearing to address the evidentiary and instructional issues raised on direct appeal.

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully requests that the Court grant this Motion for Rehearing.

Respectfully submitted,

OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
For James C. Newell, Jr., Appellant

BY: /s/ Hunter N. Aikens
Hunter N. Aikens, Miss. Bar 102195
COUNSEL FOR APPELLANT

OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
Post Office Box 3510
Jackson MS 39207-3510
Phone: (601) 576-4290
Fax: (601) 576-4205
email: haike@ospd.ms.gov

CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for James C. Newell, Jr., do hereby certify that I have this day filed the foregoing **Motion for Rehearing** with the Clerk of this Court using the MEC system, which sent electronic notification to the following:

Honorable John R. Henry Jr.
Attorney General's Office
Post Office Box 220
Jackson, MS 39205-0220

This the 7th day of October, 2014.

/s/ Hunter N. Aikens
Hunter N Aikens, MSB#102195
COUNSEL FOR APPELLANT

OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
Post Office Box 3510
Jackson, Mississippi 39207-3510
Telephone: 601-576-4200
Fax: 601-576-4205
email: haike@ospd.ms.gov

APPENDIX C

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

Muriel B. Ellis
Post Office Box 249
Jackson, Mississippi 39205-0249
Telephone: (601) 359-3694
Facsimile: (601) 359-2407

(Street Address)
450 High Street
Jackson, Mississippi 39201-1082

e-mail:sctclerk@courts.ms.gov

February 10, 2015

This is to advise you that the Mississippi Court of Appeals rendered the following decision on the 10th day of February, 2015.

Court of Appeals Case # 2013-KA-00030-COA
Trial Court Case # 2008-0293-CR1

James C. Newell, Jr. a/k/a James C. Newell a/k/a James Newell a/k/a Chuck Newell v. State of Mississippi

The motion for rehearing is denied. Griffis, P.J., would grant.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *
If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found at www.mssc.state.ms.us under the Quick Links/Supreme Court/Decision for the date of the decision or the Quick Links/Court of Appeals/Decision for the date of the decision.